NO. 35037-1

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

BOTANY UNLIMITED DESIGN AND SUPPLY, LLC, dba BOTANY UNLIMITED DESIGN AND SUPPLY,

Appellant,

v.

STATE OF WASHINGTON, LIQUOR AND CANNABIS BOARD,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Appellant Botany Unlimited Design and Supply (Botany) argues CR 41 confers an absolute right to voluntary dismissal without prejudice. But, when dismissing an action pursuant to CR 41(a), a court has the discretion to dismiss the action with prejudice. Thus, when Botany brought a civil suit, neglected to pursue it, and then sought to dismiss without prejudice, the superior court properly exercised its discretion in this matter to dismiss the action with prejudice under CR 41(a), as the statute of limitations had expired on the sole cause of action in Botany's complaint.

Botany concedes its sole cause of action was properly dismissed with prejudice, but asks this Court to reverse by arguing that its CR 41 motion was not intended to apply to its yet-to-be-alleged tort claims. This argument provides no reason to reverse the superior court's decision. At no time did Botany amend its complaint to add any additional claims. Botany's unfiled claims were therefore not before the superior court, and the trial court cannot be required to speculate about future unspecified claims.

Finally, Botany seeks to distract this Court by arguing that its motion below was improperly decided as a motion for reconsideration. Regardless of which civil rule applied to that motion, the result is the

same. A dismissal with prejudice was proper, as the Liquor and Cannabis Board (Board) is entitled to finality as to Botany's cause of action against it. The superior court's order was correct as a matter of law and should be affirmed.

II. STATEMENT OF THE ISSUES

1. Did the superior court correctly dismiss Botany's cause of action with prejudice?

2. Did the superior court correctly deny Botany's motion to Amend/Vacate?

III. COUNTERSTATEMENT OF THE CASE

On September 15, 2015, the Board issued a Final Order denying the renewal of a marijuana license for Botany.

On September 23, 2015, Botany filed its Petition for Review appealing the agency's final order in Franklin County Superior Court.[1]

On October 15, 2015, Botany filed its complaint for damages in Franklin County Superior Court based on the same factual transactions as its Petition for Review. CP 1-6; *See* Appellant's Opening Brief page 5. Botany's sole cause of action was a land-use claim based on RCW 64.40.020. *Id.* The Board filed its answer on November 13, 2015.

[1] That Final Order was the subject of a separate appeal, which has now been finalized. *See Matter of Botany Unlimited Design & Supply, LLC*, 198 Wn. App. 90, 92, 391 P.3d 605, 606, review denied, *Matter of Botany Unlimited Design & Supply, LLC*, 188 Wn.2d 1021, 398 P.3d 1143 (2017).

CP 8. The superior court subsequently issued a scheduling order, and a trial date was set for October 12, 2016. At no time did Botany amend its complaint or add any additional claims to its complaint. CP 45.

On June 14, 2016, Botany filed a CR 41 motion to dismiss the cause of action, but failed to properly note the motion. CP 12-18. Botany continued to take no action on its motion, even after the trial date of October 12, 2016. The Board, desiring a resolution to the case, noted Botany's motion for hearing. The motion hearing was scheduled for November 7, 2016.

On November 7, 2016, the motion hearing took place. During oral argument, Botany argued it had an absolute right to the dismissal without prejudice, pursuant to CR 41. *See* CP 14-15. The Board argued the dismissal should be with prejudice because the statute of limitations on Botany's sole cause of action under RCW 64.40 had expired. The Board also argued Botany was in violation of the superior court's scheduling order and that the court had the discretion to dismiss Botany's case pursuant to CR 40(d). The superior court dismissed Botany's case with prejudice on November 7, 2016. CP 19-20.

The superior court's order dated November 7, 2016, did not contain the specific language dismissing the case with prejudice. On December 12, 2016, the Board filed a motion to correct the clerical

mistake and have the written order amended to correspond with the court's ruling. CP 29-30. In response, on December 13, 2016, Botany filed a motion labeled "Motion To Amend/Vacate Order," and requested the court clarify that its dismissal with prejudice applies only to actions brought under RCW 64.40. CP 45-46.

On January 26, 2017, the Board filed its reply. In addition to arguing its motion to correct clerical mistake should be granted, it also argued that Botany's motion was improper under both CR 60 and CR 59 and should be denied because it failed to meet the requirements set by CR 60, and was untimely under CR 59. CP 58-60.

On January 26, 2016, the superior court granted the Board's motion to correct the clerical mistake, and denied what the court agreed was Respondent's motion for reconsideration. CP 61-64.

IV. ARGUMENT

A. Standard of Review

The standard of review of an order regarding a motion to dismiss under CR 41 is manifest abuse of discretion. *McCandlish Elec., Inc. v. Will Constr. Co.*, 107 Wn. App. 85, 93, 25 P.3d 1057 (2001); *Gutierrez v. Icicle Seafoods, Inc.*, 198 Wn. App. 549, 553, 394 P.3d 413, 415 (2017). An abuse of discretion occurs when the ruling is manifestly unreasonable

or discretion was exercised on untenable grounds. *State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The standard of review of a superior court's denial of a motion for reconsideration and its decision to consider new or additional evidence presented with the motion is likewise manifest abuse of discretion. *Martini v. Post*, 178 Wn. App. 153, 161, 313 P.3d 473, 478 (2013) (citing *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 683, 15 P.3d 115 (2000)). Furthermore, the standard of review of an order regarding a CR 59(h) motion to amend judgment is for abuse of discretion. *Worden v. Smith*, 178 Wn. App. 309, 322–23, 314 P.3d 1125, 1132 (2013).

The standard of review of a superior court's denial of a motion to vacate is whether the court exercised its discretion on untenable grounds or for untenable reasons. *Stoulil v. Edwin A. Epstein, Jr., Operating Co.*, 101 Wn. App. 294, 3 P.3d 764 (2000). Additionally, on review of an order denying a motion to vacate, only "the propriety of the denial not the impropriety of the underlying judgment" is before the reviewing court. *Bjurstrom v. Campbell*, 27 Wn. App. 449, 450–51, 618 P.2d 533 (1980). An un-appealed final judgment cannot be restored to an appellate track by means of moving to vacate and appealing the denial of the motion. *State v. Gaut*, 111 Wn. App. 875, 881, 46 P.3d 832, 835 (2002).

B. The Superior Court Properly Dismissed Botany's Case with Prejudice Because the Statute of Limitations Had Expired On Its Sole Cause of Action.

It is undisputed that the sole cause of action in Botany's complaint was properly dismissed with prejudice. *See* Appellant's Opening Brief page 9. It is also undisputed that Botany never made an attempt to amend its complaint to add additional claims. CP 45. Botany, however, claims the superior court abused its discretion because Botany wanted the dismissal to decide in advance that it would have no prejudice on Botany's yet-to-be filed or unfiled claims. Botany offers no authority for a court to consider the hypothetical effect of its order dismissing a claim on unfiled claims. For every case, there can be a number of other unfiled claims. It is unreasonable to request the court to consider, and parties to take a position on, such claims. In substance, Botany is trying to use the dismissal process, and now this appeal, to obtain an advisory ruling about how dismissal of its complaint will affect other claims not yet filed.

The ruling in *Escude v. King County Pub. Hosp. Dist.*, 117 Wn. App. 183, 190, 69 P.3d 895 (2003) should guide the outcome here. As in that case, the statute of limitations on the plaintiff's sole cause of action had expired, and it would have been pointless for the superior court to dismiss the matter without prejudice. *See Escude*, 117 Wn. App. at 192. In *Escude*, appellants attempted to circumvent the statute of

limitations issues by asserting an additional claim on appeal that was not raised in their complaint, nor argued to the court below. *Id.* The Court of Appeals declined to consider the new claim. *Id.* There is no basis to distinguish the result in *Escude* from the issue raised by Botany.

Botany's primary argument claims that it had an absolute right to dismissal without prejudice under CR 41. Case law shows Botany is wrong. While under CR 41(a)(1) dismissal is mandatory, the court has discretion to dismiss with, or without, prejudice. *Escude,* 117 Wn. App. 183, 190. *In re Det. of G.V.*, 124 Wn.2d 288, 297–99, 877 P.2d 680, 685–86 (1994); *Elliott Bay Adjustment Co. v. Dacumos,* No. 75215-4-I, 2017 WL 3587374 (Wn. Ct. App. Aug. 21, 2017) (citing *Escude*).

Botany relies on *Greenlaw v. Renn,* 64 Wn. App. 499, 824 P.2d 1263 (1992) for its proposition that it had an absolute right to dismissal without prejudice. First, *Greenlaw* is distinguishable here because the *Greenlaw* court ignored or refused to consider the motion for dismissal by voluntary nonsuit and decided the case on the merits; and the statute of limitations issue was not before the superior court. Second, *Greenlaw* does not support Botany's contention. *Escude* provides guidance on *Greenlaw*'s holding that is directly on point:

> The Escudes, Fleming, and Anderson rely on *Greenlaw v. Renn* for the proposition that CR 41 confers an absolute right to voluntary dismissal

> without prejudice. A review of the holding in *Greenlaw* does not support the claim.... Contrary to Fleming's and Anderson's claim here, the *Greenlaw* court did not decide whether there was an absolute right to a voluntary dismissal of claims without prejudice. Further, the *Greenlaw* case was decided prior to the Supreme Court's ruling in *In re Detention of G.V.*

Escude, 117 Wn. App. at 191.

Botany argues that the ruling in *Escude* only allows dismissal with prejudice to claims conceded by a plaintiff, and not to non-conceded claims. In *Escude*, however, the court was only considering claims that the plaintiff had conceded on summary judgment. *Escude*, 117 Wn. App. at 192. Likewise here, only the conceded land-use claim was raised and properly before the superior court. In other words, the alleged distinction raised by Botany does not exist here: there were not unconceded claims before this Court, only potential, yet-to-be-filed claims.

Botany also relies on *Gutierrez*, 198 Wn. App. at 549. As Botany points out, the *Gutierrez* court stated that dismissals with prejudice may be exercised where dismissal without prejudice would be pointless, including "when the statute of limitations has run. . . ." *Gutierrez*, 198 Wn. App. at 557 (citing approvingly to *Escude*). This case, thus, supports the superior court action here.

Ultimately, Botany claims there is error not because of dismissal of its actual claim with prejudice, but because it wanted the superior court or this Court to give an advisory statement that such dismissal is inapplicable to any other potential claims Botany *could* have raised. Appellant's Opening Brief at page 11. But such claims were not raised prior to dismissal. Such a clarification by this Court is therefore unnecessary and unjustified. This Court need only address the sole cause of action raised by Botany below in deciding whether dismissal with prejudice was proper. As Botany concedes, that cause of action was properly dismissed with prejudice.

C. The Superior Court Properly Denied Botany's Motion to Amend/Vacate.

1. The superior court properly considered Botany's motion as a motion for reconsideration.

On December 13, 2016, Botany filed a motion it labeled as a motion to "amend/vacate." CP 44-53. Botany requested the superior court amend its November 7, 2016 order, and clarify that its dismissal with prejudice applies only to actions brought under RCW 64.40. CP 45-46. Substantively, Botany's motion reargued the merits and requested the court to amend its order thus seeming to come within the confines of CR 59 as a Motion for Reconsideration. As shown above, regardless of what Botany calls its motion, there was no abuse of discretion in denying

it because case law confirms the superior court properly dismissed Botany's claim with prejudice. Moreover, Botany's motion was untimely under CR 59, because it was more than ten days after the court's original ruling, and because Botany does not show that its motion fits any of the subsections of CR 59 concerning substantive rights.

2. Even if this Court decided CR 60 was applicable, the motion was properly denied by the superior court.

Botany does not rely on CR 59, and thus makes no arguments for its applications, relying instead on a theory that it filed a timely motion to vacate a judgment under CR 60. Should this Court decide that CR 60 should have been applied by the superior court, denial of the motion was still proper. Botany's motion did not meet the requisite requirements of CR 60(b) because it failed to state any legal basis to vacate the order dismissing with prejudice.

Under CR 60(b), the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons:

> (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
>
> (2) For erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings;

> (3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);
>
> (4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (5) The judgment is void;
>
> (6) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;
>
> (7) If the defendant was served by publication, relief may be granted as prescribed in RCW 4.28.200;
>
> (8) Death of one of the parties before the judgment in the action;
>
> (9) Unavoidable casualty or misfortune preventing the party from prosecuting or defending;
>
> (10) Error in judgment shown by a minor, within 12 months after arriving at full age; or
>
> (11) Any other reason justifying relief from the operation of the judgment.

None of the grounds set forth in CR 60(b) support amending the court's order. Botany implicitly concedes this point, as it provides no specific basis by which CR 60(b) would support the vacation of the court's order in its briefing. *See* Appellant's Opening Brief.

In briefing filed with the superior court, Botany appeared to rely on CR 60(b)(1). Here, Botany fails to establish any mistake, inadvertence, surprise, excusable neglect or irregularity with the dismissal order. *Id.* Botany and the court were on notice of the Board's position that the dismissal should be with prejudice, and the court agreed with that position. There was nothing surprising or irregular about the manner in which the court's order was obtained. Botany's legal position is simply not correct – there is no absolute right to a dismissal without prejudice pursuant to CR 41. Thus, even if CR 60(b) were considered, the superior court did not err.

Finally, Botany relies on *Spokane County v. Specialty Auto & Truck Painting, Inc.*, 153 Wn.2d 238, 103 P.3d 792 (2004), contending that the result here is not just. In that case, the Washington Supreme Court held that the rules of civil procedure should be applied in such a way that substance will prevail over form. *Spokane County*, 153 Wn.2d at 245. The Court should reject Botany's reliance on this case. Regardless of whether CR 59 or CR 60 applies, the superior court did not abuse its discretion in affirming that it dismissed Botany's claim with prejudice, where that claim was no longer tenable.

Thus, contrary to Botany's argument, a dismissal with prejudice in this case is the "substantial justice" contemplated by CR 8(f). A court's

"overriding responsibility is to interpret the rules in a way that advances the underlying purpose of the rules, which is to reach a just determination in every action". *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 512-13, 933 P.2d 1036 (1997) (citing CR 1). Here, there is no reason for the Board to face the potential burden of defending against another action should Botany choose to refile its case. Rather, finality of this matter serves the ends of justice where Botany's sole cause of action is no longer viable.

V. CONCLUSION

For the above stated reasons, the Board respectfully requests this Court affirm the superior court's order dismissing Botany's complaint with prejudice.

RESPECTFULLY SUBMITTED this 29th day of September, 2017.

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BOTANY UNLIMITED DESIGN AND SUPPLY, LLC, dba BOTANY UNLIMITED DESIGN AND SUPPLY, Appellant, v. STATE OF WASHINGTON, LIQUOR AND CANNABIS BOARD, Respondent.	DECLARATION OF SERVICE

I certify that I served a true and correct copy of the Brief of Respondent on all parties or their counsel of record on the date below as follows:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

RESPECTFULLY SUBMITTED this 29th day of September, 2017.

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AGO/GCE

September 29, 2017 - 1:15 PM

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